STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2010
v	No. 291273 St. Clair Circuit Court
MICHAEL ARTHUR JOYE, Defendant-Appellant.	LC No. 08-001637-FH

Before: MURRAY, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of operating a motor vehicle while intoxicated (OUIL), third offense, MCL 257.625(1) and (9). Because we conclude that there were no errors warranting relief, we affirm. We have decided this appeal without oral argument under MCR 7.214(E).

An eyewitness testified that, shortly before 10:00 p.m. on March 21, 2008, she was in line on Highway M-29 preparing to turn into the entrance for the Harsens Island Ferry. When the ferry arrived a few cars moved forward, but the cars in front of her were going around a red pickup truck that was in the "lane of travel." The driver of the truck appeared to be hunched over inside. The witness passed the driver at a "very slow idle" and could not determine the driver's condition. She called 911 from her cell phone, and proceeded to drive her car around the truck and onto the ferry. She did not see anyone else in the pickup truck as she passed.

Shortly thereafter, Officer Smith of Clay Township arrived at the scene in response to the call. He observed the pickup truck parked in the lane. The driver, who he identified as defendant, appeared to be asleep. The engine of the truck was running, and the radio was on. Smith got defendant's attention, asked him for his license and registration, and asked where he was from and where he was going. Defendant did not immediately provide his license to Smith, but instead repeatedly stated that he was waiting for the ferry. Smith noticed a strong odor of intoxicants and observed that defendant's eyes were watery and that his speech was slurred. Smith took pictures of the inside of defendant's truck. Included in the contents were beer cans on the floor in the back seat. A portion of Smith's police camera's video recording of the stop

was played for the jury.[1] Ultimately, because defendant appeared intoxicated and failed a number of field sobriety tests, Smith and other officers arrested defendant. A later blood test revealed that defendant had a blood alcohol level of .22 grams of alcohol per 100 milliliters of blood.

Defendant essentially admitted that he was intoxicated when the officers found him. However, he maintained that in response to a practical joke he had played on another individual earlier in the evening, others placed him—inebriated and unconscious—in the running truck. He awoke when Smith knocked on the window with no idea what happened. Defendant also presented the testimony of two other bar patrons, one of whom stated that he had seen defendant, the individual on whom defendant had played the joke, and others drive away from the bar in two vehicles, with defendant as a passenger in his truck.

On appeal, defendant first argues that the trial court erred when it refused to provide a specific instruction to the jury, requested by defendant, that in order to find defendant guilty of operating a motor vehicle while intoxicated, the jury must find that the defendant voluntarily chose to operate the motor vehicle.[2]

We review de novo claims of instructional error. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). Jury instructions must include all the elements of the charged offenses and must not exclude material issues, defenses and theories if the evidence supports them. *People v Clark*, 274 Mich App 248, 255; 732 NW2d 605 (2007). Even if somewhat imperfect, jury instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Id*. at 255-256.

To properly convict a defendant of OUIL, the prosecutor must prove beyond a reasonable doubt that the defendant was: (1) operating a motor vehicle, (2) on a highway, public road, or place accessible by motor vehicle, (3) while intoxicated. MCL 257.625(1). The Michigan Vehicle Code defines "operate" or "operating" as being in actual physical control of a vehicle. MCL 257.35a. A person is intoxicated under the statute if he or she has a blood alcohol content level of .08 grams or more per 100 milliliters of blood. MCL 257.625(1)(b).

[1] According to the transcription of the tape, in response to Smith's questions, defendant denied that he was sleeping, and repeatedly stated he was waiting for the ferry and that he planned to go to the island.

[2] On appeal, defendant argues that the trial court was required to instruct the jury that: In order to find the defendant guilty of operating a motor vehicle you must find that the defendant voluntarily chose to operate the motor vehicle.

In this case, the trial court provided the following jury instruction:

> To prove that the Defendant operated while intoxicated, the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the Defendant was operating a motor vehicle on or about March 21st of 2008. Now operating means driving or having actual physical control of the vehicle.
>
> Second, that the Defendant was operating a vehicle on a highway or other place open to the public or generally accessible to motor vehicles.
>
> And third, that the Defendant was operating the vehicle in Clay Township in St. Clair County.
>
> Now, an operator is anyone in actual, physical control of a motor vehicle. Furthermore, operating is to be defined in terms of the danger the statute seeks to prevent, which would be the collision of the vehicle being operated by the person with other vehicles or property. Consequently, once a person using a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing collision, that person continues to operate the motor vehicle until it is returned to a position posing no such risk.

This instruction, while perhaps not perfect, includes all the elements of the charged offense. Although defendant argues that a more specific instruction should have been given, defendant admits that the last paragraph, which was the additional language agreed upon by the parties, "was somewhat better in its wording" than the standard instruction. With this instruction, in order to find that a person "operated" the vehicle, the jury would have to conclude that the person was "a person using the motor vehicle [who] has *put the vehicle in motion, or in a position posing a significant risk of causing collision.*" Under the facts of this case, this would require a finding that defendant was the person who placed the car in motion, as opposed to being the victim of a practical joke.

Defendant relies on *People v Lardie*, 452 Mich 231, 256; 551 NW2d 656 (1996), overruled in part on other grounds, *People v Schaefer*, 473 Mich 418, 422 n 4; 703 NW2d 774 (2005), clarified by *People v Derror*, 475 Mich 316, 715 NW2d 822 (2006), to argue that the prosecution must prove that defendant must have voluntarily chosen to operate his motor vehicle in order to be convicted of OUIL. However, *Lardie* involved the crime of OUIL causing death. Thus, its application to defendant's present conviction is somewhat tenuous given the *Lardie* Court's focus was on the common law of involuntary manslaughter, causation, and gross negligence. While speaking of the mens rea requirement of OUIL causing death, the *Lardie* Court did appear to support defendant's position:

> Consequently, consistent with the Legislature's decision to presume gross negligence as a matter of law and its desire to deter intoxicated driving, the Legislature must reasonably have intended that the people prove a mens rea by demonstrating that the defendant purposefully drove while intoxicated or, in other words, that he had the general intent to perform the wrongful act. Where a statute

> requires a "criminal mind" for some, but not all, of the elements of the crime, the statute does not impose strict liability. Because the statute requires proof of a mens rea, it does not impose strict liability. Rather, we conclude that the statute requires the people to prove that a defendant, who kills someone by driving while intoxicated, acted knowingly in consuming an intoxicating liquor or a controlled substance, and acted voluntarily in deciding to drive after such consumption. [*Lardie*, 452 Mich at 256 (citations and footnote omitted).]

However, the *Lardie* Court provided a definition of the elements of OUIL causing death that apparently shifted the "voluntary decision to drive" element outside the proof of the underlying OUIL offense:

> On the basis of this analysis, the elements of the crime that the people would be required to prove are similar to those for involuntary manslaughter except that the people would not have to prove gross negligence. Hence, the people must prove that (1) the defendant was operating his motor vehicle while he was intoxicated, (2) that he voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated, and (3) that the defendant's intoxicated driving was a substantial cause of the victim's death. [*Lardie*, 452 Mich at 259-260 (citation and footnotes omitted).]

Schaefer did not change this portion of *Lardie*'s analysis. See *Schaefer*, 473 Mich at 422 n 4, 434. Thus, without a more specific instruction from our Supreme Court, we do not agree with defendant's argument that our Supreme Court intended to craft an additional requirement onto the prosecution's burden of proof in an OUIL case. In addition, as noted above, the trial court's instructions above, taken as a whole, adequately covered the mens rea requirement, insofar as they required the jury to find that defendant was the one who operated the vehicle before finding him guilty of OUIL.

The trial court did not err in refusing to provide defendant's requested jury instruction.

Defendant next argues that the prosecution did not provide sufficient evidence to support the conviction for operating a motor vehicle while intoxicated. Specifically, the prosecution presented insufficient evidence to allow a reasonable trier of fact to conclude that defendant had "operated" the vehicle, because defendant's truck was not in motion and was in park when the law enforcement officers arrived, and there was no evidence that defendant had operated the vehicle.

We review a defendant's allegations regarding insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* at 415. Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

As noted above, to support a conviction of OUIL, the prosecutor must prove beyond a reasonable doubt that the defendant was: (1) operating a motor vehicle, (2) on a highway, public road, or place accessible by motor vehicle, (3) while intoxicated. MCL 257.625(1). Defendant does not dispute that he was intoxicated at the time of his arrest. Instead, defendant argues that there was no evidence adduced to show that he was operating the truck while intoxicated.

In *People v Wood*, 450 Mich 399, 405; 528 NW2d 351 (1995), our Supreme Court specifically overruled *People v Pomeroy (On Rehearing)*, 419 Mich 441; 355 NW2d 98 (1984), to the extent that *Pomeroy* held that a person asleep in a motionless car cannot be held to be operating a vehicle. *Wood* concerned a man found unconscious in his van at a McDonald's drive-through window with the engine running, the transmission in drive, and the defendant's foot on the brake. Our Supreme Court found that defendant was operating the vehicle for the purposes of the OUIL statute even though he was asleep because the defendant had put the vehicle into a position posing a significant risk of collision and had not returned the vehicle to a position of safety. "Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *Wood*, 450 Mich at 404-405.

In this case, the prosecutor presented sufficient evidence to allow the jury to find that defendant was operating the vehicle and to support the conviction. The witness testified that she was in line in the ferry when she saw defendant hunched over in the truck, alone. Smith testified that defendant was alone, in the driver's seat, with the engine running, when Smith found him a few minutes later. This testimony, if believed, supports a reasonable inference that defendant had driven the truck, and parked it in the right lane of traffic while waiting for the ferry, before passing out. This testimony also supports a finding that defendant put his car in a position posing significant risk of collision, and had not yet returned it to a position of safety under *Wood*. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded, beyond a reasonable doubt, that defendant operated the vehicle, drove it to wait in the ferry line, put it in park and fell asleep. While this version of events would require the jury to select what portions of each witness's testimony to believe, a jury is free to believe or to disbelieve all or part of any of the evidence presented. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Nor was the prosecutor required to disprove defendant's assertion that he was the victim of a prank and his friends drove him out to the ferry dock and left him there as a practical joke. See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant compares this case to *People v Burton*, 252 Mich App 130, 651 NW2d 143 (2002). In *Burton*, the intoxicated defendant was found asleep in his running, parked car, which was located on a golf course parking lot next to a storage building. Following a jury trial, he was found guilty of attempting to operate a vehicle while under the influence of intoxicating liquor or with an unlawful blood alcohol level. This Court reversed the defendant's convictions, finding that even though the defendant had admitted that he had driven his truck from one side of the parking lot to the location where it was parked, the prosecution had failed to present sufficient evidence that defendant had the specific intent to commit the acts necessary to support his conviction. *Id*. at 142-144. The Court also distinguished the facts in *Wood*. It noted that there was no evidence that the defendant's truck was in motion when the police discovered him, it was parked when defendant was discovered, and the evidence "did not provide a basis for the jury to

properly conclude that defendant's truck was in a position posing a significant risk of causing a collision." *Id*. at 144.

Unlike *Burton*, defendant was not charged with an attempt. Thus, *Burton*'s discussion about specific intent is inapplicable. See *Burton*, 262 Mich App at 141. In addition, while defendant here was also found asleep, with the truck apparently parked, he was parked on the roadway. Given the evidence presented, the jury could properly conclude that defendant's car, which he had placed in motion, was still in a position that posed a significant risk of causing a collision. This distinguishes the present case from *Burton*, where the defendant did not go out on the roadway, and might have been using his car as a shelter, rather than a motor vehicle, in a parking lot. See e.g., *People v Stephen*, 262 Mich App 213, 220; 685 NW2d 309 (2004) (distinguishing *Burton* where the defendant admitted that he drove on public roadways to reach fairgrounds to sleep).

The prosecution presented sufficient evidence to support defendant's conviction.

There were no errors warranting relief.

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly